

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE #5 (“Union”),**

-and-

CITY OF PHILADELPHIA (“City” or “Employer”)

Grievant: P/O Victor Ortiz ([REDACTED]).

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OPINION and AWARD

AAA Case No. 01-15-0005-4264

BEFORE: Robert A. Grey, Esq., Impartial Arbitrator

HEARING DATE: May 10, 2016, at American Arbitration Association, 230 Broad
Street, Philadelphia, PA 19102

APPEARANCES:

FOR THE UNION:

Jennings Sigmond, P.C.

By: Marc L. Gelman, Esq., Shareholder

FOR THE EMPLOYER:

City of Philadelphia Law Department, Labor & Employment Unit

By: Benjamin D. Salvina, Esq., Assistant City Solicitor

INTRODUCTION

The Philadelphia Police Department found Grievant guilty of three (3) violations of the Department’s Disciplinary Code (“Code”). Based upon same, Grievant was dismissed from his employment with the City as a Police Officer. The Union seeks Grievant’s reinstatement with a make-whole remedy. It is undisputed that the grievance is arbitrable.

STIPULATED ISSUE

Did the City have just cause to discharge/
dismiss Grievant?

If not, what shall be the remedy?

BACKGROUND

Pursuant to the parties' CBA, I held an arbitration hearing of this matter on the date stated above. Both parties appeared by counsel. Both parties were afforded full, fair and ample opportunity to present and challenge documentary evidence, examine and cross-examine witnesses, and state and argue their positions. All testimony was given under oath or affirmation and my direct observation. Neither party questioned the fairness of the proceedings. I have considered all testimony, exhibits and party positions, whether or not specifically addressed in this Opinion and Award. This Opinion and Award is based upon the entire record, including my assessment of witness credibility and conflicting testimony, and the relative probative value of all evidence in the record. The proceedings were not recorded; no transcript was produced.

Grievant was appointed as a Police Officer on June 13, 2011. As the result of an Internal Affairs ("IA") investigation, Grievant was served with Charges on July 7, 2015. He pleaded not guilty and requested a hearing. City Exhibit 9.

A Philadelphia Police Department Police Board of Inquiry ("PBI") Hearing was held on September 14, 2015. Grievant was found guilty of Conduct Unbecoming under Code sections 1-§009-10, 1-§021-10 and 1-§026-10. The parties stipulate that Grievant

received a 15 day suspension on November 3, 2014 for a previous violation of 1-§009-10. The PBI recommended the following penalties: dismissal for this second violation of 1-§009-10; dismissal for violation of 1-§021-10; and a 30 day suspension for violation of 1-§026-10. City Exhibit 10.

On September 17, 2015 the Police Commissioner adopted the recommendations of the PBI on each of the three (3) charges. City Exhibit 10.

On September 22, 2015 Grievant was given Non-Criminal Gniotek Warnings. He was informed that as a result of the PBI findings, the Police Commissioner “ordered your dismissal from the Philadelphia Police Department after being found Guilty of Conduct Unbecoming and Lying.” Grievant was offered the opportunity to respond but declined to do so. Joint Exhibit 3. On the same day, Grievant was notified of his suspension for “thirty (30) days with the Intent to Dismiss”, effective immediately. Joint Exhibits 3 and 4A.

On or about October 9, 2015 Grievant was served with Notice of Intention to Dismiss, effective 10 days therefrom. Joint Exhibit 4B.

On or about October 20, 2015 Grievant was served with Notice of Dismissal, effective October 19, 2015. Joint Exhibit 4C.

On or about October 20, 2015 the Union filed a timely demand for this arbitration.

RELEVANT AUTHORITY

Philadelphia Police Department Disciplinary Code (Joint Exhibit 2):

Article I, Conduct Unbecoming:

1-§009-10: Lying or attempting to deceive regarding a material fact during the course of any Departmental investigation.

1-§021-10: Any incident, conduct, or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police Department.

1-§026-10: Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses). Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

The Code provides the following penalty schedule for the above violations:

<u>Section</u>	<u>1st Offense</u>	<u>2nd Offense</u>	<u>3rd Offense</u>	<u>Reckoning Period</u>
1-§009-10	10 days to Dismissal	<u>Dismissal</u>	[n/a]	Duration of Employment
1-§021-10	30 days or <u>Dismissal</u>	Dismissal	[n/a]	5 Years
1-§026-10	<u>30 days</u> or Dismissal	Dismissal	[n/a]	Duration of Employment

[Underlining and bold added to show penalties recommended by PBI and imposed by Police Commissioner]

Stalking, Fourth Degree (NJSA 2C:12-10(b)) [a/k/a New Jersey “domestic stalking” law] (City Exhibit 5):

A person is guilty of stalking, a crime of the fourth degree, if he purposely or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his safety or the safety of a third person or suffer other emotional distress.

Section “a” of NJSA 2C:12-10 provides the following definitions:

(1) “Course of conduct” means repeatedly maintaining a visual or physical proximity to a person; directly, indirectly, or through third parties, by any action, method, device, or means, following, monitoring, observing, surveilling, threatening, or communicating to or about, a person, or interfering with a person’s property; repeatedly committing harassment against a person; or repeatedly conveying, or causing to be conveyed, verbal or written threats or threats conveyed by any other means of communication or threats implied by conduct or a combination thereof directed at or toward a person.

(2) “Repeatedly” means on two or more occasions.

(3) “Emotional distress” means significant mental suffering or distress.

(4) “Cause a reasonable person to fear” means to cause fear which a reasonable victim, similarly situated, would have under the circumstances.

The statute provides that “a crime of the fourth degree is punishable by a term of imprisonment of up to 18 months or a fine of up to \$10,000 or both.”

POSITIONS OF THE PARTIES

The positions of the parties are garnered from their opening and closing

statements, verbatim, or nearly so.

City Position

The City dismissed Grievant for three (3) independent Code violations, each of which on its own provides just cause for dismissal.

As determined by a Moorestown, New Jersey Police Department Detective, and Philadelphia Police Department IA and a Philadelphia Police Department PBI, Grievant engaged in a course of conduct constituting the New Jersey crime of domestic stalking in the 4th degree, a felony punishable by up to 18 months in prison. Therefore, Grievant violated Code 1-§026-10. This Code section requires neither a criminal conviction nor the pendency of criminal charges.

Grievant surreptitiously placed a GPS tracking device, which he admitted ownership of, in Ms. K [REDACTED] car without her knowledge or consent. He used the GPS device to track her repeatedly over a period of time. Ms. K [REDACTED] discovery of the device caused her significant mental suffering or distress, which was obvious to the New Jersey Detective during his investigation, and plainly visible during Ms. K [REDACTED] testimony at this hearing.

The New Jersey Detective investigating the criminal complaint had probable cause to arrest Grievant on the felony domestic stalking charge. Only after the complainant stated to the Detective that she did not want Grievant arrested, and only after the Detective got confirmation from the local New Jersey prosecutor's office that arrest was not mandated, did the Detective decide not to arrest Grievant. That the complainant did not want Grievant to be arrested or to lose his job, and that Grievant

was neither arrested nor prosecuted, are all irrelevant under the Code.

The City has proven that Grievant lied during the Philadelphia Police Department investigation, in violation of Code 1-§009-10. His version of events does not stand up to the credible testimony of either the New Jersey Detective or Ms. K[REDACTED]. Grievant's version of events does not match the GPS location and ping documentary evidence.

The City has proven that Grievant engaged in a course of conduct which indicates he has little or no regard for his responsibility as a member of the Police Department, in violation of Code 1-§021-10.

The City has proven these charges and the underlying conduct beyond a reasonable doubt, even though that is not the level of proof required for this arbitration.

Ms. K[REDACTED] testimony was credible; Grievant's was not. The only reasonable conclusion from their testimony and the documentary evidence is that Grievant planted the GPS device in Ms. K[REDACTED] car without her knowledge or consent, used it to track her on and after October 12 without her knowledge or consent, and that Grievant lied and was deceitful during the Department's investigation of his conduct.

The City had just cause to find Grievant violated Code 1-§009-10, 1-§021-10 and 1-§026-10. Grievant received a 15 day suspension on November 3, 2014 for a prior violation of 1-§009-10. The applicable Reckoning Period for violation of 1-§009-10 is duration of employment. The Code penalty for a 2nd Offense in violation of 1-§009-10 is dismissal.

The City is entitled to the benefit of its bargain that the appropriate penalty for these Code violations is dismissal.

Additionally, during his testimony at this arbitration, Grievant admitted to using the GPS device to track his wife in Pennsylvania without her knowledge or consent, and that she was upset when she found out about it. Thus Grievant admitted under oath to committing domestic stalking in Pennsylvania, a felony under Pennsylvania law.

For all of the foregoing reasons, the City urges that the grievance should be denied in all respects. Grievant should not be reinstated, but if he is, he should be required to meet the usual pre-hiring conditions, including background check and medical clearance.

Union Position

This case is about the underlying facts on or about October 12, 2014, not the internal Philadelphia Police Department steps in response. The Union does not dispute the internal disciplinary procedures which led to Grievant's dismissal, but there is no need to get there. Rather, the Union disputes the underlying facts upon which these internal procedures and decisions were based. When the true underlying facts are seen, the opinion of the PBI does not matter, and the City's entire case falls like a house of cards, because there is no just cause for any level of discipline at all.

The fact is that Grievant did not plant the GPS device in Ms. K [REDACTED] car. Without that fact the City has no case.

The City's entire case comes down to the testimony of two (2) witnesses:

Grievant and Ms. K [REDACTED].

The ultimate question is: did Ms. K [REDACTED] voluntarily accept and agree to hold Grievant's GPS device, as Grievant claims, or did Grievant surreptitiously place the GPS device in Ms. K [REDACTED] vehicle, as the City claims? That's it. For all intents and purposes, the documentary evidence is of no value. This is a he-said, she-said case, which hinges solely on the credibility of his and her respective testimony. Grievant told the truth; Ms. K [REDACTED] did not.

Because the alleged underlying conduct is criminal, or quasi-criminal, and the Code mirrors criminal codes, the City's burden of proof should be beyond a reasonable doubt, or at the very least clear and convincing. The City has not met its burden under either standard.

Grievant was never charged or arrested, let alone convicted, of any crime in either New Jersey or Pennsylvania. The City has not proven that Grievant committed the elements of any crime, or the elements of New Jersey domestic stalking in particular.

Grievant's testimony at this arbitration that he placed the device in a vehicle that he owns that his wife regularly used to track her in Pennsylvania because he suspected her of being unfaithful is irrelevant. It is irrelevant because the charged conduct and investigation had nothing to do with Grievant allegedly stalking his wife, nor violating Pennsylvania domestic stalking laws.

Grievant had no reason to lie about when he gave the device to Ms. K [REDACTED], because there was no exculpatory value for him to do so – Grievant would be no more

or less culpable if he gave the device to Ms. K [REDACTED] on October 12, or three (3) or four (4) weeks prior. Grievant's answer to this question is consistent with the subpoenaed device data, and with the Moorestown Police Department Detective's report and testimony, in that none of the device location data prior to October 12 had anything to do with Ms. K [REDACTED]. None of the pre-October 12 locations were Ms. K [REDACTED] work, school or aunt's address in New Jersey.

Ms. K [REDACTED] had reason to lie, and she did so. Yes, she appeared upset when she testified about this incident, but she was upset because she feels guilty that her lies about this whole incident caused Grievant to lose his job. Maybe Ms. K [REDACTED] lied about this whole incident because she was angry with Grievant. If she was scared and upset upon finding the device, why would she wait a week before going to the police after she allegedly found it? Rather, she was upset when she testified because she decided to make this story up from the beginning to get Grievant in some trouble, never anticipating that her story would cause Grievant to lose his job.

All three (3) charges depend upon the respective credibility of just these two (2) people. Grievant told the truth; Ms. K [REDACTED] did not. The charges can not stand up to the truth of what really happened.

For all of the foregoing reasons, the Union urges that the grievance should be sustained in all respects. Grievant should be returned to work immediately, with full back pay and emoluments, and this entire matter should be expunged from his record. The Arbitrator should retain jurisdiction for a reasonable period of time for implementation of the remedy.

DISCUSSION AND OPINION

The weight of the credible evidence establishes that the City did have just cause to discharge/dismiss Grievant. This determination is based upon the following findings.

On or about September 17, 2014 (all dates are in 2014 except where indicated otherwise) Grievant purchased a GPS tracking device, model “eZoom SOS Personal GPS Tracker” for \$49.99, with a credit card issued in his name. On the same day, with the same credit card, he authorized a recurring \$19.99 monthly charge for access to the device’s cellular location reporting and pinging capabilities.

Pinging allows an authorized user to request the device to immediately report its location on demand. Pinging can be done from any device with internet access, including a smartphone. The only authorized user of record is Grievant.

Also on or about September 17, Grievant registered the device using his marital residence in Philadelphia, using an email address of his, and a telephone number of his. During the registration process Grievant named the device.

Grievant named his GPS tracking device “GOTCHA”.

The GPS device is a small plastic rectangular box, which measures approximately 3 inches by 1 inch by 1 inch.

Grievant and Ms. K [REDACTED] dated on and off between 2011 and 2014. They have differing recall of exactly when in October they stopped dating.

According to Ms. K [REDACTED], whose presence and testimony at the arbitration hearing were pursuant to subpoena, she and Grievant stopped dating prior to October 12, but were still friends. As of October 12 she was dating someone else, but she

considered neither the someone else nor Grievant to be her boyfriend. Ms. K [REDACTED] was aware that Grievant was married, but separated from his wife because Grievant believed his wife was or had been cheating on him.

According to Grievant, he and Ms. K [REDACTED] were getting along fine on October 12, and still dating. Grievant testified that at that time he was in a very bad relationship with his wife; he had previously caught his wife cheating at a motel; and that prior to October 12 Grievant had started the process of filing for divorce.

According to Grievant's IA interview questions and answers Statement ("Q&A"; City Exhibit 11), his relationship with Ms. K [REDACTED] ended on good terms on October 15, though he testified at the arbitration that the relationship ended on good terms approximately two (2) days after the October 12 Eagles game, when Ms. K [REDACTED] became upset that Grievant's wife answered the phone when Ms. K [REDACTED] telephoned Grievant, who was sleeping at the time. Grievant testified that the "fallout" from Ms. K [REDACTED] being upset about Grievant's wife answering this phone call is what prompted Ms. K [REDACTED] to go to the police in Moorestown, New Jersey, and report the GPS device.

Ms. K [REDACTED] primary residence is in Philadelphia. However, she works and attends school in Mount Laurel, New Jersey. She often resides at her aunt's house in Moorestown, New Jersey, because it is more convenient to her work and school than is her own residence in Philadelphia. There is no record evidence that Grievant and Ms. K [REDACTED] ever lived together.

Grievant and Ms. K [REDACTED] agreed to get together at a bar to watch the Eagles play a night game on October 12. They met at a bar in Philadelphia in the vicinity of

Howard and Diamond Streets. They each drove their own vehicles to the bar. They parked their cars on Diamond Street near the bar, but not next to each other. Grievant parked his vehicle in the vicinity of 121-147 Diamond Street. Ms. Kucuk parked her vehicle in the vicinity of 187 Diamond Street.

The subpoenaed GPS records show that on October 12 the device first arrived in the vicinity of 121-147 Diamond Street at 1636 hours. From 1646 to 2027 the device remained at 121-147 Diamond Street. At 2246 the location of the device changed to the vicinity of 187 Diamond Street. The device remained in the vicinity of 187 Diamond Street until 2301 hours.

Beginning at approximately 2306 hours the device was in motion from Philadelphia to Moorestown, New Jersey, via the Benjamin Franklin Bridge. From 2341 hours on October 12 until 1134 hours on October 13 the device was stationary in the vicinity of Ms. K [REDACTED] aunt's house in Moorestown, New Jersey.

The above device locations and movements are consistent with the conclusions of both the Moorestown Police Department investigation and the Philadelphia Police Department IA investigation that while at the bar there came a time when Grievant had access to Ms. K [REDACTED] vehicle with the opportunity to hide the device in her car without her knowledge or consent. Grievant did so. He never informed Ms. K [REDACTED] that he placed a GPS tracking device in her vehicle.

The subpoenaed device records corroborate the credible hearing testimony and Ms. K [REDACTED] statements to investigators. The record evidence shows that approximately 15 minutes before Ms. K [REDACTED] left the bar to go to her aunt's house in Moorestown, New

Jersey, Grievant had access to her vehicle. At approximately 2246 hours Grievant moved the device from his car into Ms. K [REDACTED] car without her knowledge or consent. Ms. K [REDACTED] drove away at approximately 2341 hours, to Moorestown, New Jersey, without knowledge that the device was hidden in her car.

The credible evidence does not support Grievant's claim that he placed a bag containing the GPS device and binoculars in the trunk of Ms. Kucuk's car, with her knowledge and consent. Rather, the credible evidence establishes that Grievant secretly hid the device in the pocket on the back of the driver's seat of Ms. K [REDACTED] vehicle, and never disclosed this to Ms. K [REDACTED].

On October 14 Ms. K [REDACTED] was cleaning her car in New Jersey. She found an unknown object inside the pocket on the back of the driver's seat. It was not in plain view. She observed that the object had lights that were lit and/or blinking. The unknown object scared, upset and distressed her. She felt unsafe. She did not know how or when the object got into her car, nor who placed it there. Not knowing what to do, she pressed the largest button on the device and placed it in a bag. She left the device in her car, believing it was safer to do that than bring it into her aunt's house.

Ms. K [REDACTED] searched online and learned the unknown object was a GPS tracking device. Scared, upset, confused and unsure what to do, Ms. K [REDACTED] brought it to the Moorestown Police Department station house on October 21, a week after she found it. Ms. K [REDACTED] reported how she had found the device.

The Moorestown Police Department took a report, vouchered the GPS device and investigated. On October 22 the Detective assigned to the case subpoenaed the

records for the device from its provider company, SecurusGPS. After inadvertent delay by the company, the Detective received the subpoenaed records on January 7, 2015. The records included account ownership, registration and payment information. Also provided were the GPS device's location and ping histories. The ping history shows the dates and times that the GPS device was queried to report its location to the authorized user, *i.e.*, Grievant.

This documentary information, along with his overall investigation, led the Detective to have probable cause to arrest Grievant for the New Jersey felony of domestic stalking, in that the Detective concluded that Grievant placed the device in Ms. K [REDACTED] car during the Eagles game on October 12 without her knowledge or consent, that Grievant used the device to repeatedly track Ms. K [REDACTED] whereabouts in New Jersey from the night of October 12 until her discovery of the device on October 14, and that this caused emotional distress to Ms. K [REDACTED].

On January 7, 2015 the Detective telephoned Ms. K [REDACTED] and apprised her of the results of his investigation. She was upset and confused to learn from the Detective that the device belongs to Grievant. She did not expect this because Grievant is a Police Officer. The Detective informed Ms. K [REDACTED] that she could apply for a Temporary Restraining Order ("TRO") and/or sign a criminal complaint against Grievant. She requested time to think about her options, and to consult with a friend who is a Pennsauken, New Jersey, Police Officer.

On February 3, 2015, Ms. K [REDACTED] telephoned the Detective and declined at that time to apply for a TRO and declined at that time to sign a criminal complaint against

Grievant. Ms. K [REDACTED] told the Detective she wanted Grievant to know that she knew what Grievant did, and that she did not want Grievant to contact her again. The Detective asked Ms. K [REDACTED] to appear at the Moorestown Police Department station house to sign a Victim Notification form showing that she was declining to pursue a TRO and criminal complaint at that time.

On February 18, 2015, after also consulting with her father, Ms. K [REDACTED] appeared at the Moorestown Police Department station house and signed a Victim Notification form showing that she was declining to pursue a TRO and/or criminal charges at that time. The Detective informed Ms. K [REDACTED] that he would contact Philadelphia Police Department IA, and it would be IA's determination whether the Philadelphia Police Department or the Detective would inform Grievant of Ms. K [REDACTED] desire for Grievant to know she knew what Grievant did, and that she did not want Grievant to ever contact her again.

On February 19, 2015 the Detective telephoned Philadelphia Police Department IA. He explained the facts and circumstances to an IA Lieutenant. This included the need for either the Philadelphia Police Department or the Moorestown Police Department to contact Grievant to inform him he committed the New Jersey offense of domestic stalking of Ms. K [REDACTED] via the GPS device. It also included the need to inform Grievant that if he has any further contact with Ms. K [REDACTED], he will be criminally charged with domestic stalking, and Ms. K [REDACTED] will apply for a TRO.

Also on February 19, 2015, the Detective consulted with the Burlington County, New Jersey, prosecutor's office and confirmed that this was not a must-arrest situation.

On February 26, 2015 the Detective emailed his investigative report and supporting documents to the same Philadelphia Police Department IA Lieutenant.

On April 20, 2015, upon sufficient notice, in the presence of counsel, and with notice of his Garrity Rights, Grievant was interviewed by IA. The Q&A were transcribed into a Statement. Grievant signed each page of the Statement on April 27, 2015. Grievant did not indicate any errors or mistakes in the Statement, nor request any changes. Immediately above his signature, in all uppercase, appears: "I HAVE READ THE FOREGOING STATEMENT CONSISTING OF (4) PAGES AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE." City Exhibit 11.

The Q&A included the following, verbatim:

Q. Were you in her car at any point the day you went to watch the football game?

A. Yes. We took her car.

Q. Do you own an EZoom SOS Personal GPS Tracker?

A. Yes. She has it.

Q. How do you know she has it?

A. She's holding it for me.

Q. When did you give her this device to hold for you?

A. She had it for 3 or 4 weeks prior to the football game.

Q. Why did you feel the need to give the device to Ms. K [REDACTED] to hold for you?

A. So my wife wouldn't find it and I trusted Ms. K [REDACTED].

Q. When was the last time you saw her prior to the football game?

A. We saw each other at least once a week prior to the football game.

Q. Were you still dating Ms. K [REDACTED] at the time of the football game?

A. Yes.

Q. When did your relationship end?

A. I believe it was October 15th.

Q. Did your relationship with Ms. K [REDACTED] end on good terms?

A. I thought so, yes.

Q. Where is that device now?

A. I believe it is with her?

Q. What did you own that device for?

A. My wife was having an affair and I was using it to track my vehicle that my wife was using.

Q. Did you place that device in Ms. K [REDACTED] car?

A. No.

Q. If you didn't place that device in Ms. K [REDACTED] car can you explain how it got there?

A. By herself.

Q. Have you spoke to Ms. K [REDACTED] since you last saw her?

A. October 15th but not since then.

Q. Is there anything else that you would like to add to your statement that I have not asked that may be relevant to this investigation?

A. Yes. On my old phone I have text messages asking her to hold the GPS device for me. I will go home and try to find [my old] phone to retrieve the text messages so I can show you.

Q. Will you also be able to provide me with a detailed bill from your cellular provider documenting that message?

A. Yes, If they provide it to me.

City Exhibit 11.

The Union asserts there is confusion with regard to the Q&A question, "When did you give her this device to hold for you?" and Grievant's answer, "She had it for 3 or 4 weeks prior to the football game." The Department determined this was one of Grievant's untruthful answers. The Union argues that Grievant's answer was misconstrued and "lost in translation" between the Q&A interview and its transcription into the Statement. The Union argues that the "3 or 4 week period" Grievant referred

to in his answer was the time from when Grievant asked Ms. K[REDACTED] to hold the device for him, until October 12, when Grievant claims he actually gave the device to Ms. K[REDACTED].

The Union stresses that Grievant had no reason to lie about when he gave the device to Ms. K[REDACTED], because there was no exculpatory value for him to do so. The Union argues Grievant would be no more or less culpable if he gave the device to Ms. K[REDACTED] on October 12, or three (3) or four (4) weeks prior. The Union argues that it makes no sense that Grievant would activate the device on September 17 and then immediately give it Ms. K[REDACTED]. The Union points out that Grievant's answer is consistent with the subpoenaed device data, and the Moorestown Police Department Detective's report and testimony, that none of the device location data prior to October 12 involved Ms. K[REDACTED] work, school or aunt's home in New Jersey. Grievant testified that the pre-October 12 GPS device locations in the subpoenaed records are his wife's locations when she used one of Grievant's vehicles in which he had placed the device.

Even assuming that the Union's arguments about this Q&A answer are correct, the outcome remains the same, because the record establishes that a number of other Q&A responses given by Grievant were lies or deceit regarding material facts. For example:

Q. Were you in her car at any point the day you went to watch the football game?
A. Yes. We took her car.

The record establishes that Ms. K[REDACTED] and Grievant arrived at (and later departed) the bar separately, having taken their own respective vehicles. Grievant's

access to Ms. K [REDACTED] vehicle on the day of the Eagles game was a material fact relating to his opportunity to place the GPS tracking device in it. Grievant's statement that "We took her car" created a false period of Grievant's ostensibly legitimate access to Ms. K [REDACTED] vehicle.

Q. How do you know she has it?

A. She's holding it for me.

The record establishes that Ms. K [REDACTED] had no knowledge whatsoever of Grievant's GPS device prior to her inadvertent discovery of it on October 14 while cleaning her car in New Jersey. The record establishes that Ms. K [REDACTED] did not ever agree to hold or take possession of the device, and that she had no knowledge of, and never gave her consent for, Grievant to place the GPS tracking device in her vehicle.

Q. Why did you feel the need to give the device to Ms. K [REDACTED] to hold for you?

A. So my wife wouldn't find it and I trusted Ms. K [REDACTED].

The record establishes that Grievant "gave" the device to Ms. K [REDACTED] (*i.e.*, secreted it in her vehicle) to enable him to track Ms. K [REDACTED] whereabouts.

Grievant testified he was in the process of moving out of his marital residence on and around October 12, and that he needed a place to put the device and his binoculars, both of which he testified he had used to surveil his wife and catch her being unfaithful at a motel prior to October 12. Grievant also testified that during this period of time he had his marital residence on [REDACTED], and a separate residence on [REDACTED]. Grievant could have stored the device in the residence he did not share with his wife. If Grievant's intent was to prevent his wife from finding the device, he could easily have achieved this without giving it to Ms. K [REDACTED] (or anyone else).

Even assuming that Grievant's answer to this question was true, the record is devoid of any reason or explanation for Grievant's pinging of his device 50 times total in the two (2) week period, including 21 times during the first two (2) days, after he "gave" it to Ms. K [REDACTED] to "hold" for him on October 12, allegedly so that his wife would not find it.

The device is a small plastic rectangular box, which measures approximately 3 inches by 1 inch by 1 inch. An item this small would be easy to hide virtually anywhere, carry on one's person or keep in one's own vehicle.

Q. Did you place that device in Ms. K [REDACTED] car?
A. No.

The record establishes that Grievant did place (hide) the device in Ms. K [REDACTED] car on October 12, and did so without her knowledge or consent.

Q. If you didn't place that device in Ms. K [REDACTED] car can you explain how it got there?
A. By herself.

The record establishes that Grievant placed (hid) the device in Ms. K [REDACTED] car. Ms. K [REDACTED] had no knowledge of the device, and did not place it in her vehicle.

The above statements by Grievant during the investigation were dishonest and/or deceitful. They were not "lost in translation" between the interview and the transcription thereof. In view of the entire record, they establish that Grievant violated Code 1-§009-10.

The record establishes that surreptitiously placing a GPS tracking device in someone else's vehicle and using the device to track that vehicle/person is conduct which evinces little or no regard for one's responsibility as a member of the Police

Department, in violation of Code 1-§021-10.

Analysis of the relevant device location data (City Exhibit 3), and the pings sent by Grievant to the device to report its location to him (Union Exhibit 1), on October 12 and thereafter, is illustrative:

<u>Date</u> (2014)	<u>Time</u> (hours) P = Ping	<u>Grievant's "GOTCHA" eZoom SOS Personal GPS Tracker</u> <u>Location</u>
Oct. 12	1046 P	Within 62' of [xxxx] [REDACTED], Phila., PA [vicinity of Grievant's alternate residence]
"	1556	Within 30' of [xxxx] [REDACTED], Phila., PA [Grievant's marital residence]
"	1646	Within 49' of 121-147 Diamond St., Phila., PA [near bar for Eagles game]
"	1824 to 2027	Within 30' to 46' of 126 Diamond St., Phila. PA and within 59' to 69' of 126 Diamond St., Phila. PA [same location as above near bar for Eagles game]
"	2246 to 2301	Within 23' to 39' of 187 Diamond St., Phila. PA [new location near bar for Eagles game]
"	2306	Within 59' of 1429 Frankford Ave., Phila. PA
"	2311	Within 36' of E. Girard Ave., Phila. PA
"	2316	Within 75' of Callowhill St. & N. 2 nd St., Phila. PA
"	2317	Within 26' of 501 Callowhill St., Phila. PA [Benjamin Franklin Bridge]
"	2321	Within 30' of Admiral Wilson Blvd., Merchantville, NJ
"	2326	Within 26' of 2054-2334 Kaighn Ave., Cherry Hill, NJ
"	2331	Within 30' of 322-362 New Jersey 38, Moorestown, NJ
"	2336	Within 33' of [xxxx-xxxx] [REDACTED], Moorestown, NJ

<u>Date</u> (2014)	<u>Time</u> (hours) <u>P = Ping</u>	<u>Grievant's "GOTCHA" eZoom SOS Personal GPS Tracker</u> <u>Location</u>
"	2341	Within 26' of [xxxx] [xxxx] [REDACTED], Moorestown, NJ [Ms. K [REDACTED] part time residence in NJ for school and work (her aunt's house)]
"	<u>2349 P</u>	Within 33' of [xxxx] [xxxx] [REDACTED], Moorestown, NJ [Ms. K [REDACTED] part time residence in NJ for school and work (her aunt's house)]
Oct. 13	<u>0010 P</u>	Within 30' of [xxxx] [xxxx] [REDACTED], Moorestown, NJ [Ms. K [REDACTED] part time residence in NJ for school and work (her aunt's house)]
"	<u>1110 P</u>	Within 56' of [xxxx] [xxxx] [REDACTED], Moorestown, NJ [Ms. K [REDACTED] part time residence in NJ for school and work (her aunt's house)]
"	<u>1134 P</u>	Within 46' of [xxxx] [xxxx] [REDACTED], Moorestown, NJ [Ms. K [REDACTED] part time residence in NJ for school and work (her aunt's house)]
"	<u>1209 P</u>	Within 36' of [xxxxx] [REDACTED], Mount Laurel, NJ [Ms. K [REDACTED] work]
"	<u>1816 P</u>	Within 36' of [xxxxx] [REDACTED], Mount Laurel, NJ [Ms. K [REDACTED] work]
"	<u>1819 P</u>	Within 36' of [xxxxx] [REDACTED], Mount Laurel, NJ [Ms. K [REDACTED] work]
"	<u>1901 P</u>	Within 39' of [xxxxx] [REDACTED], Mount Laurel, NJ [Ms. K [REDACTED] work]
"	<u>2009 P</u>	Within 43' of [xxxx] [xxxx] [REDACTED], Moorestown, NJ [Ms. K [REDACTED] part time residence in NJ for school and work (her aunt's house)]
Oct. 14	<u>1013 P</u>	Within 75' of [xxxx] [xxxx] [REDACTED], Moorestown, NJ [Ms. K [REDACTED] part time residence in NJ for school and work (her aunt's house)]
"	<u>1142 P</u>	Within 39' of [xxxx] [xxxx] [REDACTED], Moorestown, NJ [Ms. K [REDACTED] part time residence in NJ for school and work (her aunt's house)]

<u>Date</u> (2014)	<u>Time</u> (hours) <u>P = Ping</u>	<u>Grievant's "GOTCHA" eZoom SOS Personal GPS Tracker</u> <u>Location</u>
"	<u>1225 P</u>	Within 43' of [xxxxx] [REDACTED], Mount Laurel, NJ [Ms. K [REDACTED] work]
"	1519	Alert! GOTCHA's eZoom was Powered Off! Please charge GOTCHA's eZoom locator as soon as possible and power on. [location not provided]
"	<u>2054 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2054 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2054 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2056 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2056 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2059 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2059 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2100 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2123 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2125 P</u>	We are unable to communicate with your locator. Please try again later.
Oct. 15	<u>0159 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>0201 P</u>	We are unable to communicate with your locator. Please try again later.

<u>Date</u> (2014)	<u>Time</u> (hours) <u>P = Ping</u>	<u>Grievant's "GOTCHA" eZoom SOS Personal GPS Tracker</u> <u>Location</u>
"	<u>0203 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2137 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>2140 P</u>	We are unable to communicate with your locator. Please try again later.
Oct. 16	<u>1122 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>1123 P</u>	We are unable to communicate with your locator. Please try again later.
Oct. 18	<u>2144 P</u>	We are unable to communicate with your locator. Please try again later.
Oct. 26	<u>1733 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>1733 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>1733 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>1734 P</u>	We are unable to communicate with your locator. Please try again later.
"	<u>1737 P</u>	We are unable to communicate with your locator. Please try again later.

Thus the record establishes that Grievant pinged his GPS tracking device 50 times for Ms. K [REDACTED] location while he alone knew it was in her vehicle, starting 43 minutes after her departure alone from the bar at approximately 2306 hours on October 12, through 1737 hours on October 26, 2014. Almost half of these pings (21 of 50) occurred on October 13 and 14 – the two (2) days immediately after Grievant and

Ms. K [REDACTED] were at the bar together to watch the Eagles game.

Grievant pinged the device to report Ms. K [REDACTED] location to him once on October 12, at 2349 hours; 11 times on October 13, at 0009, 1109, 1133, 1209, 1816 (3 times in 1 minute), 1819 (twice in 1 minute), 1901 and 2009 hours; 13 times on October 14, at 1013, 1142, 1225, 2054 (3 times in 1 minute), 2056 (twice in 1 minute), 2059 (twice in 1 minute), 2100, 2123 and 2125 hours; five (5) times on October 15, at 0159, 0201, 0203, 2137 and 2140 hours; twice on October 16, at 1122 and 1123 hours; once on October 18, at 2144 hours; and five (5) times October 26, at 1733 (3 times in 1 minute), 1734 and 1737 hours.

If, as Grievant claims, he gave the device to Ms. K [REDACTED] with her knowledge and consent on October 12 to hold for him so his wife would not find it, there is no explanation or reason in the record why Grievant pinged the device on the above dates and times. This course of conduct is consistent with the elements of New Jersey felony domestic stalking. It is not consistent with Grievant's version of events.

Grievant testified that his experience with the device is that the battery's charge lasts no more than approximately 24 hours. He suggested this shows that someone, possibly Ms. K [REDACTED], plugged a cable into the device and into a power source and charged the device while it was in her possession after October 12. Ms. K [REDACTED] testified the lights on the device were working when she found it on October 14. The Moorestown Police Department Detective testified the lights on the device were working when he vouchered it on October 21.

There is no record evidence that Ms. K [REDACTED], or anyone else, ever charged the

device after Grievant hid it in her vehicle. Moreover, she could not charge a hidden device that she did not know she had. Grievant presented no objective or documentary evidence to support his speculative testimony that the battery's charge lasts no more than approximately 24 hours.

The subpoenaed records show Grievant pinged the device 12 times in the first 24 hours after it was in Ms. K [REDACTED] possession. This establishes that Grievant knew the device was powered on and working. Grievant pinged it 13 times in the second 24 hour period after it was in Ms. K [REDACTED] unknowing possession. Grievant pinged it five (5) times in the third 24 hour period after it was in Ms. K [REDACTED] unknowing possession. The last five (5) pings of record were on October 26. Grievant pinged the device a total of 50 times from October 12, 2348 hours, to October 26, 1737 hours. This establishes that Grievant knew and/or expected that the device has a battery life of substantially longer than approximately 24 hours.

Assuming, without finding, that the battery only lasts approximately 24 hours, the record establishes that Grievant engaged in conduct constituting the elements of New Jersey domestic stalking 12 times within the first 24 hours after he secreted the device in Ms. K [REDACTED] vehicle on October 12.

The Union argues this is a case that primarily hinges on the relative credibility of Grievant and Ms. K [REDACTED]. Grievant's version of events is not consistent with the documentary evidence, and does not withstand reasonable inquiry based upon all the facts and circumstances in the record. On the other hand, Ms. K [REDACTED] version of events is consistent with the documentary evidence, and does withstand reasonable inquiry

based upon all the facts and circumstances in the record.

Grievant's underlying conduct toward Ms. K [REDACTED] was thoroughly and fairly investigated by the Moorestown Police Department. The Philadelphia Police Department thoroughly and fairly investigated Grievant's conduct toward Ms. K [REDACTED] when same was brought to its attention by the Moorestown Police Department. Grievant's similar conduct toward his wife in Pennsylvania is not within the scope of this hearing.

The record establishes that Grievant purchased, surreptitiously placed and repeatedly monitored the device's location in Ms. K [REDACTED] personal vehicle, all without her knowledge or consent. Grievant surreptitiously placed the device in her car on the evening of October 12, during their Eagles game get-together. He tracked the device when they parted that evening, and into the early morning and morning of October 13, when Ms. K [REDACTED] drove home alone to her aunt's house in New Jersey. He continued to use the device to track Ms. K [REDACTED] without her knowledge or consent for several more days. Ms. K [REDACTED] inadvertent discovery of the unknown device hidden in her car caused her emotional distress as defined by the New Jersey domestic stalking statute.

Thus, the record establishes that Grievant engaged in "action that constitutes the commission of a felony . . . which carries a potential sentence of more than (1) year. . . [by] the commission of an equivalent offense in another jurisdiction, state or territory [for which] [n]either a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters." Thus, the City had just cause to find Grievant violated Code 1-§026-10. The Code penalty for violation of 1-§026-10 is "30

days or Dismissal". The City assessed a 30 day suspension for this violation.

The record establishes that such a course of conduct evinces "little or no regard for his/her responsibility as a member of the Police Department." Thus, the City had just cause to find Grievant violated Code 1-§021-10. The Code penalty for violation of 1-§021-10 is "30 days or Dismissal". The City assessed dismissal for this violation.

The record establishes that Grievant "[Lied] or attempt[ed] to deceive regarding material fact[s] during the course of [a] Departmental investigation." Thus, the City had just cause to find Grievant violated Code 1-§009-10. This is Grievant's second violation of 1-§009-10 within the applicable Reckoning Period, to wit: "Duration of Employment". The Code penalty for a second violation of 1-§009-10 is dismissal.

Therefore, the penalty of dismissal assessed by the Department against Grievant was within the range of penalties collectively bargained by the parties into the Code, was within the parties' reasonable expectations, and was appropriate under all the facts and circumstances proven in this record.

Thus, despite the Union's thorough defense and excellent representation, the City had just cause to dismiss/discharge Grievant from his employment as a Police Officer for his proven Conduct Unbecoming.

The remainder of the Union's arguments are not persuasive.


Therefore, based upon all of the above, the grievance must be denied, and I issue the following:

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AWARD

1. The City had just cause to discharge/dismiss Grievant.
2. Therefore, the grievance is denied.

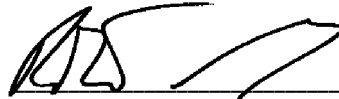
Dated: June 16, 2016



Robert A. Grey, Impartial Arbitrator

AFFIRMATION

I hereby affirm that I executed this instrument as my Opinion and Award.



Dated: June 16, 2016

Robert A. Grey, Impartial Arbitrator